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Retroactivity of Laws: An Illustration of Intertemporal Conflicts Law Issues through the Revised Civil Code Articles on Disinheritance

“Time is always necessary in the law.”¹

I. INTRODUCTION

The problem of conflicts of laws in time is not novel; rather, the law that concerns this problem has a history as deep and rich as that of the written law itself.² Although “[c]onventional views of legal change emphasize the values of certainty and reliance, and are therefore hostile to explicitly retroactive laws,”³ the frequency with which these conflicts arise is steadily increasing. The cause of this development is the exponential growth in new legislation over the past twenty years.⁴

The law of retroactivity of laws, also called “intertemporal conflicts” law, is highly complex, implicating a variety of federal and state constitutional concerns including the Contracts Clause, the Takings Clause, and the Due Process Clause as well as the comparable provisions of the state constitution. The law of retroactivity of laws affects a variety of substantive law areas and has the potential of divesting individuals of vested property rights. Retroactive law-making challenges the presumptions underlying democracy and the fundamentals of civilized and just societies.⁵ That is, individuals in such societies conform their behavior and carry out transactions in accordance with legislation. When new legislation is

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1. Rebecca R. French, *Time in the Law*, 72 U. Colo. L. Rev. 663 (2001).

2. It is also important to note that the antipathy for retroactive laws likewise has an ancient history dating back to the Greeks. For a discussion of such history, see Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775 (1936).

3. Saul Levmore, *Changes, Anticipations, and Reparations*, 99 Colum. L. Rev. 1657 (1999).

4. J.-R. Trahan, *Time for a Change: A Call to Reform Louisiana's Intertemporal Conflicts Law (Law of Retroactivity of Laws)*, 59 La. L. Rev. 663, 665 (1999) (citing Françoise Dekeuwer-Défossez, *Les Dispositions Transitoires dans la Législation Civile Contemporaine* § 1, at 2 (1977); Jacques Ghestin & Gilles Goubeaux, *Traité de Droit Civil: Introduction Générale* § 330, at 293 (3d ed. 1990) (J.-R. Trahan trans.); 1 Philippe Malaurie & Laurent Aynès, *Cours de Droit Civil: Introduction à l'Étude de Droit* § 631, at 203-04 (2d ed. 1994)).

5. See generally Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 Geo. L. J. 2143 (1996); Andrew C. Weiler, *Has Due Process Struck Out? The Judicial Rubberstamping of Retroactive Economic Laws*, 42 Duke L. J. 1069 (1993).

enacted, notions of how individuals are to conduct themselves and affairs is disrupted. Certainty and stability in the law is preferred. Individuals expect to be able to rely on established law without any rights potentially being affected. In sum, retroactive laws meddle with already-established legal interests and rights.

The current intertemporal conflicts law is flawed with a variety of deficiencies, the most significant being the lack of an official definition of retroactivity and standards for the courts to employ in the determination of intertemporal conflicts law issues. The lack of such guidance has prompted much scholarly commentary and debate amongst members of the legal communities of both common law and civil law systems. An assortment of solutions has been proposed in each system to address the current deficiencies. These proposals will be analyzed in this comment.

The plan of this comment is as follows. Part II considers and examines intertemporal conflicts law in the abstract, explicating the two sets of intertemporal law rules. It discusses the basic rules of retroactivity including civil law solutions, common law solutions, and the solutions adopted by the authors of Louisiana's Civil Code article 6.⁶ Furthermore, it examines the constitutional rules of intertemporal law that limit the power of the legislature to impose retroactive effects, in particular, the Due Process Clauses of the federal and state constitutions.

Part III provides a concrete (and timely) illustration of the complexities and deficiencies in this law and how the proposed solutions fare substantively, one based on the recent re-enactment in Louisiana of the law of "disinherison." The intertemporal issues presented by the re-enactment of that law are tangibly and practically suited for this purpose because sorting out those issues requires consideration of both the basic intertemporal law and the constitutional constraints on legislative retroactivity. Temporal conflicts created by the re-enactment of that law are a particularly useful illustrative device because many of the possible cases to which the new law might be applied fall into the hardest category of intertemporal cases to solve—those that involve a "dispersion of the facts." This new legislation also serves as a useful vehicle for illustrating proposed solutions to problems associated with basic intertemporal law (Louisiana Civil Code article 6) and constitutional intertemporal law. This illustration of the retroactive application of law through the substantive area of Louisiana successions law,

6. La. Civ. Code art. 6 provides, "In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary."

specifically the law on disinheritance, will provide a civilian analysis to a recurring legal problem that jurists, attorneys, academics, and citizens alike can appreciate.

Finally, Part IV of the comment stresses the importance of the law of retroactivity of laws. In addition, it encourages further comprehensive studies and analyses in this area to foster smoother transitions in the law.

II. INTERTEMPORAL LAW

A. Explication of the Two Sets of Intertemporal Law Rules

Before any discussion of the permissibility of the retroactive application of any new law is possible, a critical examination and analysis of the law of retroactivity of laws itself is required. Intertemporal law involves two sets of rules: basic rules and constitutional rules. The basic rules are used to determine whether the legislature wanted the new law to be applied retroactively. Legislative intent and direction controls this set of rules. The constitutional rules implicated by intertemporal law set limitations on the power of the legislature to impose retroactive effects.

Two questions arise in the analysis of the permissibility of the retroactive application of a particular law. The criterion for identifying retroactive application of the law is somewhat of a "two-pronged" test. One must not conflate the two prongs for they are completely conceptually distinct from one another. The first question to be analyzed is if the new law is applied to this particular situation, would this in fact qualify as a retroactive application of the law? If the answer to this question is no, then there is no intertemporal conflicts law problem. If the answer is yes, then one must proceed to the second prong of the test: given that applying the new law to this situation would qualify as a retroactive application, is it then permissible to do so? It is at this level that constitutional provisions are implicated. This two-prong test is to be applied to every retroactivity problem regardless of the substantive area of the law.

B. Basic Rules

The basic rules of intertemporal law have one objective and one objective only: to determine whether the legislature wished for the new law to be applied retroactively. If the legislature clearly directed retroactive application of the law, then the "basic rules" analysis is at an end. But, if the legislature did not, then legislative intent as to retroactivity must be reconstructed. In reconstructing the legislature's intent, there is a general default rule: presume that the legislature

wanted no retroactivity. There is an exception, however, in reference to procedural and interpretative legislation. Procedural law is the set of rules that prescribe the steps for having a right or duty judicially enforced; procedural law contrasts with substantive law which defines the specific rights or duties themselves. Interpretative law is the body of law that ascertains the meaning of laws.

1. The General Rule: Presume the Legislature Wanted No Retroactivity

The default rule in retroactivity of law examinations is to presume that the legislature did not intend or want the legislation to apply retroactively.⁷ The most difficult problem of intertemporal law has been devising a definition of retroactivity and establishing criterion for retroactivity versus prospectivity. Without such concrete guidelines, intertemporal law issues will continue to plague legislatures and courts alike.

a. Civil Law Solutions

In most, if not all, civil law jurisdictions other than Louisiana, the "basic" rule (unlike the basic rules in common law jurisdictions and in Louisiana) is relatively uncomplicated: when there is ambiguity as to whether the legislature (or law-making body) intended for the law to be retroactively applied, the civil law default rule is that the law is to be applied prospectively only. This rule, obviously enough, is identical to the general rule of Louisiana Civil Code article 6, of which it is, in fact, the source. Under this civil law rule, as under the general rule of article 6, distinguishing "retroactive" from "prospective" applications is critically important. A variety of definitions of or criteria for identifying retroactivity has arisen within the civil law traditions.

(i) Traditional Theories

(aa) Vested Rights

The theory of vested rights⁸ dominated civilian intertemporal conflicts law until the early part of this century. The leading works on the theory include those of Merlin and Savigny.⁹ In *Henry v. Jean*,

7. La. Civ. Code art. 6.

8. Also referred to as the theory of acquired rights. Acquired and vested can be used interchangeably.

9. 10 Phillippe Antoine Merlin, *Répertoire Universel et Raisonné de*

the Louisiana Supreme Court stated that a retrospective or retroactive law is defined as one which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability with respect to transactions or considerations already passed.¹⁰ This definition seems to be indistinguishable from that associated with the civilian theory of vested rights.¹¹ A right is vested when "the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest."¹² Thus, a vested right is both a property or patrimonial right¹³ and a present right.

The concept of vested rights has been criticized for decades by a variety of scholars.¹⁴ The notion of vested rights is so vague and poorly defined that it could easily be inaccurately applied should one equate a mere right with a vested right. A vested right is one that has been fully realized. There is a stark contrast in a right that has not yet been fully realized (what is merely an expectation) and a vested right.¹⁵ For courts to apply the notion of vested rights when they are dealing with mere expectations results in tremendous inaccuracy and inconsistency in the analysis of retroactive application of the law. Another problem with the theory is that, because of its exclusive focus on the acquisition and loss of rights, it fails to account for cases involving changes in status, for example, changes in the definition of "majority."¹⁶ Such changes can sometimes produce a more significant economic loss than would the deprivation of a vested right. Perhaps the most serious defect of the theory is the lack of correspondence or conformity between the solutions it prescribes and the solutions arrived at by the courts.¹⁷

Jurisprudence 1-90 (5th ed. 1826); 8 Friedrich Carl de Savigny, *Traité de Droit Romain* §§ 383-400, at 363-528 (Charles Guenoux trans. 1851).

10. 238 La. 314, 115 So. 2d 363, 367 (1959).

11. Trahan, *supra* note 4, at 688.

12. *Id.* at 689-90 (quoting *Terrebone v. South Lafourche Tidal Control*, 445 So. 2d 1221, 1224 n.9 (La. 1984) (quoting *Tennant v. Russell*, 214 La. 1046, 1052, 39 So. 2d 726, 728 (1949)); *DOTD v. McClendon*, 552 So. 2d, 1220, 1221 (La. App. 5th Cir. 1989).

13. *Id.* at 690, 742. A patrimonial right is a right that is susceptible of pecuniary value or a right to which a dollar value can be readily attached.

14. *Id.* at 711-12; Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 696; James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 Corn. L. Rev. 87, 114 (1993); Bryant Smith, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231, 246 (1927).

15. For example, in successions law, succession rights and forced heirship rights do not vest until the moment of the testator's death. Until such time, these rights are merely expectations.

16. Trahan, *supra* note 4, at 742.

17. *Id.* at 723. There are also a number of other deficiencies of the vested

(bb) Completed Acts

The theory of completed acts arose in Germany in response to Napoleonic legislation. Immediate repercussions were felt in France and Italy.¹⁸ The theory of completed acts maintains that acts completed while the old law was in effect are governed by that law, whereas those completed after the imposition of the new law are governed by that law. As a result, executory contracts, born under the dominion of the prior law, are forever governed by it.¹⁹

The theory asserts that retroactivity involves the timing of a particular act or other event to which a statute attaches juridical consequences.²⁰ This is what civil law scholars call the "presupposition" (*presupposé, supuesto*), "hypothesis" (*hypothèse, ipotesis*), or "juridical facts" (*faits juridiques, Tatbestand*). In other words, where the presupposed act or event occurs after the effective date of the new statute, the proposed application cannot be considered retroactive. Conversely, where the presupposed act or event occurs before the effective date of the new statute, the proposed application may and, under some circumstances, should be considered retroactive.²¹ In sum, the theory of the completed act proposes that what matters is to find out not if a right has been acquired, but if an act has been realized during the reign of the old law, because laws operate directly on acts by assigning juridical consequences to them.²²

Like the theory of vested rights, the completed acts theory is also not without fault.²³ It, too, is extremely vague in that it pinpoints retroactivity to the time(s) at which the acts or other events that compose the "presupposition" (or "hypothesis") as opposed to the "consequence" (or "effect") of the new law. It is often difficult to determine what acts or events should be considered part of the presupposition. Furthermore, because the theory focuses on "completed" acts, it is not well suited to handle those cases in which a "dispersion of facts" occurs. The facts are dispersed in time when some events that the presupposition entails occur before the new law becomes effective and some occur after the new law becomes effective. Likewise, this theory is not the best-suited theory to resolve

rights theory, the scope of which is much too broad for this comment. See generally Trahan, *supra* note 4.

18. 1 Guillermo A. Borda, *Tratado de Derecho Civil: Parte General* § 166, at 182. (J.-R. Trahan trans. 1999).

19. *Id.*

20. Trahan, *supra* note 4, at 695 (citations omitted).

21. *Id.*

22. *Id.* citing Ignacio Galindo Garfias, *Derecho Civil: Parte General* § 76, at 169.

23. See generally Trahan, *supra*, note 4.

retroactivity problems that are still in the course of effect, that is, producing effects at the moment the new law intervenes.

(ii) *Modern Theory: Roubier*

The reigning civil law alternative on this subject is the work of Paul Roubier.²⁴ Whereas most other theories on retroactivity focus on "rights" or "acts," Roubier's system revolves around the notion of the "juridical situation." According to Roubier, a juridical situation is a complex of rights and duties.²⁵ He asserts that "every law is made in order to determine a certain number of juridical situations in favor of or against certain persons. Thus, it is in their action vis-a-vis past, present, or future juridical situations that the action of laws in time is summed up."²⁶ In other words, what possible applications of a new statute qualify as retroactive depends on how those applications would affect the "juridical situations" at which that statute is aimed.²⁷

In Roubier's scheme, each juridical situation has two distinct phases: "a dynamic phase, which corresponds to the time of the constitution of the situation and also its extinction"²⁸ and "a static phase which corresponds to the time at which the situation produces its effects."²⁹ Unlike other theories, Roubier's system encompasses three temporal effects. The retroactive effect occurs when the new law goes back before the day of its promulgation (goes back to the past). The immediate effect is the application of the law in the present. Finally, the deferred effect (survival of the old law) occurs when the new law "lets the old law be applied for all the juridical effects that are still to come from acts that occurred prior to the new law's promulgation."³⁰

b. *Common Law Solutions*

Common law definitions of retroactivity have arisen from the works of scholars and the judicial opinions of America's courts. Such definitions include: "[A] retroactive statute is one which gives to preenactment conduct a different legal effect from that which it

24. Paul Roubier, *Le Droit Transitoire: Conflicts des Lois Dans le Temps* (2d. 1960) [hereinafter "Roubier, *Le Droit Transitoire*"].

25. Paul Roubier, *Droits Subjectifs et Situations Juridiques* 52, 53 (1963).

26. Roubier, *Le Droit Transitoire*, *supra* note 24, at 181.

27. J.-R. Trahan on the theory of Roubier (unpublished work on file with the author).

28. Roubier, *supra* note 24, at 182.

29. *Id.*

30. Roubier, *Le Droit Transitoire*, *supra* note 24, at 177-81.

would have had without the passage of the statute,"³¹ "[O]ne which reaches back to attach new legal rights and duties to already completed transactions;"³² "All changes in government policy . . . impose gains and losses on those who, prior to the change, had taken actions with long-term consequences;"³³ and "A law is retroactive if it alters the legal status of acts that were performed before it came into existence."³⁴ *Retroactive Law* by Stephen Munzer discusses a variety of theories of retroactive law.³⁵ The first he examines is the declaratory theory (Blackstonian retroactivity) that is dependent on the view expressed by Blackstone that courts merely declare the law, never create it.³⁶ Under this theory, if a court overrules an earlier decision, it does no more than declare what the law has always been and applies this law to the case at hand. Another theory of retroactivity is the changed response theory. It views retroactive law as merely altering the instructions given to legal officials regarding things that happened in the past. "A very different theory, intended to cover retroactive legislation as well as retroactive decisional law, sensibly holds that a law is retroactive if it applies to an act done before the law came into existence."³⁷

2. *Exceptions: Procedural & Interpretative Legislation*

The general rule of the law of retroactivity of laws is to presume that the legislature did not want the law to be retroactively applied. There is, however, an exception to this general rule. Thus, the presumption against retroactivity is one that is rebuttable. The exception involves procedural and interpretative legislation. Louisiana Civil Code article 6 provides that "procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary." Thus, a procedural or interpretative law will be applied retroactively if the legislature does not express an intention otherwise.

To reiterate, a procedural law prescribes the steps required to have a right or duty judicially enforced. Procedural law is distinct from the substantive law that defines the specific rights or duties themselves.

31. Hochman, *supra* note 14, at 692.

32. *Id.* at 692 (quoting *Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338, 42 S. Ct. 325 (1922)).

33. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 509 (1986).

34. Stephen R. Munzer, *Retroactive Law*, 6 J. Legal Stud. 373 (1977).

35. *Id.*

36. See 1 William Blackstone, *Commentaries on the Laws of England* 69-70 (1965).

37. Munzer, *supra* note 34, at 377.

Procedural laws generally govern burdens of proof, evidence, prescription, rules of trials, juries, venue, and rules on motions and pleadings.³⁸ An interpretative law ascertains the meaning of laws.

An interpretative law does not create new rights and duties but simply determines the meaning of existing laws. In other words, an interpretative law merely establishes the meaning that an interpreted statute or law had from the time of its enactment. "It is the original statute, not the interpretative one, that establishes rights and duties."³⁹ The legislature may state through interpretative laws what other laws are actually meant to accomplish or achieve. An example of an interpretative law is Louisiana Revised Statutes 9:2794 in that it describes a standard of conduct determining more precisely the meaning of certain kinds of fault by certain classes of defendants. Louisiana Revised Statutes 9:2794 determined professional negligence, imprudence, and want of skill by medical generalists and specialists, who were originally responsible for damage occasioned by such fault under Louisiana Civil Code articles 2315 and 2316.⁴⁰

C. Constitutional Rules

1. Enumeration

Retroactivity considerations implicate various provisions of both the U.S. and Louisiana Constitutions.⁴¹ Such federal provisions include the Contracts Clause,⁴² the Takings Clause,⁴³ and the Due

38. An example of a procedural law associated with the new legislation on disinheritance will help to illustrate. Some of the changes instituted with the revised Civil Code articles on disinheritance are minor procedural changes in the law. One such change involves the uncorroborated testimony of the disinherited heir that the blameworthy act or conduct in question did not really occur. In this area of the law, there is a rebuttable presumption that what is recorded in the executed act of disinheritance is true. Previously, before the law was inadvertently repealed, the uncorroborated testimony of the heir to the contrary was enough to rebut this presumption. However, under the new legislation, this is not sufficient. The question arises, did the legislature want this procedural law to be retroactively applied? In accordance with the text of Louisiana Civil Code article 6, it is presumed that the legislature did want procedural and interpretative law to be retroactively applied, for there is no legislative expression to the contrary.

39. *Ardoin v. Hartford Acc. & Indemn. Co.*, 360 So. 2d 1331, 1339 (La. 1978).

40. *Id.* at 1339.

41. See generally Edward S. Stimson, *Retroactive Application of Law—A Problem in Constitutional Law*, 38 Mich. L. Rev. 30 (1939).

42. "No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." U.S. Const. art. I, § 10.

43. ". . . nor shall private property be taken for public use, without just compensation." U.S. Const. amend. VI.

Process Clause.⁴⁴ The comparable Louisiana constitutional provisions include the Prohibited Laws Clause,⁴⁵ the Right to Property Clause,⁴⁶ and the Due Process Clause.⁴⁷ The U.S. Constitution prohibits “ex post facto” laws in the criminal realm; thus, no criminal laws can be retroactively applied. Because the Contracts Clause and Takings Clause are limited to specific areas of the law and to specific situations within those areas, most of the discussion on retroactivity has revolved around the Due Process Clause and those rights of individuals that are to be protected. The interests largely at issue are those that are of an economic nature.⁴⁸ Historically, most retroactivity problems focused largely on an economic aspect of life through some right. This trend continues with an even greater frequency today.

While the Due Process Clause is definitely the most general provision of the three, it was not written to govern retroactive versus nonretroactive applications of the law nor does it specifically speak to the manner in which the courts should determine whether to retroactively apply a law.⁴⁹ However, in the absence of a constitutional clause on the permissibility of the retroactive application of the law in the civil context, the Due Process Clause

44. “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .” U.S. Const. amend. XIV.

45. “No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted.” La. Const. art. I, § 23 (1974).

46. “Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit . . . Personal effects shall be never taken . . .” La. Const. art. I, § 4 (1974).

47. “No person shall be deprived of life, liberty, or property, except by due process of law.” La. Const. art. I, § 2 (1974).

48. Krent, *supra* note 5, at 2148-52.

49. According to Professor J. Randall Trahan in a speech entitled “*Conflicts of Laws in Time: A Critical Overview*” delivered to the Louisiana Judicial College, June 2001, “Though these constitutional provisions admittedly have some connection with the temporal effects of new legislation, they are not, however, part of the intertemporal law, properly so called. Two of the provisions, the Contracts Clause and the Takings Clause, are of limited scope: the former applies only to new laws that pertain to ‘contract law,’ the latter, only to new laws that pertain to ‘property law.’ And none of the three—not even the Due Process Clause—has as its sole purpose the resolution of conflicts of laws in time. The real thrust of each of these provisions is in other directions.” For example, the direction of the Takings Clause is in its protection of private property against governmental encroachment. Likewise, the direction of the Contracts Clause is specifically to protect the impairment of obligations by the government. Professor Trahan further asserts that “[t]o the extent that the provisions regulate successions laws at all, they do so indirectly and only as an incident to their primary functions.”

seems to be the only way in which to proceed with an analysis of such subject. Indeed, the tests for constitutional permissibility of retroactive applications of law are modeled on the due process standard.

2. The Test: When Does Retroactive Application of New Legislation Violate Due Process?

The test to determine if a law is to be constitutionally retroactively applied depends on whether the retroactive application of that new law violates the Due Process Clause. The older test employed by the United States Supreme Court focused on the “vested rights” theory. The traditional principle invoked in determining the constitutionality of retroactive legislation was that a statute could not abrogate vested rights.⁵⁰ The prohibition against retroactive laws protected against substantive legislative interference only those interests, as defined by pre-existing law, that had “vested.”⁵¹ Review of economic legislation under the Due Process Clause had its roots in the *Lochner* era⁵² where the courts were less likely to apply laws retroactively.⁵³ This older test based on the vested rights theory to determine if a retroactive application would violate due process was very similar to the traditional civil law criterion for retroactivity.

With time, the *Lochner* approach came to be replaced by the “rational basis test” beginning in *West Coast Hotel v. Parrish*⁵⁴ and *Williamson v. Lee Optical of Oklahoma, Inc.*⁵⁵ The new test is a “rational means-ends” test that asks if the chosen legislative end (that the law be retroactively applied) bears a rational relationship to the attainment of some legitimate state objective. The U.S. Supreme Court, in applying the Due Process Clause in *Usery v. Turner Elkhorn Mining Co.*,⁵⁶ stressed that “legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality.”⁵⁷ The presumption applies even if the legislation “upsets otherwise settled expectations...[or] impose[s] a new duty or liability based on past acts.”⁵⁸ The U.S. Supreme Court has only required a standard of reasonableness in retroactive applications by

50. Hochman, *supra* note 14, at 696.

51. Kainen, *supra* note 14, at 105.

52. Krent, *supra* note 5, at 2150; *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539 (1905).

53. See generally, Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. Rev. 1 (1991).

54. 300 U.S. 379, 57 S. Ct. 578 (1937).

55. 348 U.S. 483, 75 S. Ct. 461 (1955).

56. 428 U.S. 1, 96 S. Ct. 2882 (1976).

57. Krent, *supra* note 5, at 2150 (quoting *Usery*, 428 U.S. at 15-16).

58. *Id.*

stating, "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches."⁵⁹

Despite the fact that the U.S. Supreme Court has moved from the vested rights theory test to the rational means test, Louisiana courts continue to use the old test. While this is permissible for interpretation of the Due Process Clause contained in the Louisiana constitution because state courts are the final arbitrators of its laws' meaning, this is not adequate for interpretation of the federal Due Process Clause, as to which federal courts are the final arbiters of meaning.

III. ILLUSTRATION: ANALYSIS OF INTERTEMPORAL ISSUES PRESENTED BY THE REENACTMENT OF THE CIVIL CODE ARTICLES ON DISINHERISON

A. *Background on Louisiana Successions Law: Disinherison*

1. *Explication of Disinherison*

Disinherison is the means of depriving an undeserving heir of his forced portion.⁶⁰ The concept of disinherison was received from Roman law into Spain and France.⁶¹ "The inclusion of Spanish law in the Louisiana Civil Code of 1808 is intensely important so far as disinherison is concerned because all the evidence points to the [conclusion] that the rules and causes for disinheritance were adopted from Spanish sources in general and from *Las Siete Partidas* in particular."⁶²

When included as part of the Louisiana Civil Codes of 1808, 1825, and 1870, "the grounds [for disinherison] were basically those stated in Justinian's 115th Novel,⁶³ with the addition of the ground of

59. *Id.* at 2150-51 (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-30, 104 S. Ct. 2709, 2717-18 (1984)).

60. Frederick William Swaim & Kathryn Venturatos Lorio, *Louisiana Civil Law Treatise, Successions and Donations* § 11.14 (1995).

61. Leonard Oppenheim, *Louisiana Civil Law Treatise, Successions and Donations* § 66 (1973).

62. *Id.* § 67, at 152.

63. A child could be disinherited if he (1) assaulted his father; (2) held him up to public disgrace; (3) prosecuted him for any crime but treason; (4) informed against him to his danger; (5) attempted his life; (6) committed adultery with his father's wife; (7) prevented him from making a will; (8) refused to be his bail; (9) refused to redeem him from captivity; (10) neglected him, if he became insane. A son could be passed over if (11) he engaged in witchcraft; (12) became an actor or gladiator, unless his parents were of that class; (13) became a heretic. A daughter

marrying during minority without parental consent.”⁶⁴ The ten grounds listed in the early Louisiana Codes remained unchanged until 1983 when the ground of the child’s conviction of a felony for which he could be subjected to life imprisonment or death was added.⁶⁵ Initially, testators were not very successful in attempts to disinherit their descendants. Subsequently, a number of legislative changes enhanced the likelihood of a successful disinheriton.

The Louisiana law of successions and donations dramatically changed during the past eleven years.⁶⁶ In 1997, the Louisiana Legislature adopted an Act calling for a massive revision of over half of the law of successions. In response, the Louisiana State Law Institute revised the law and the legislature enacted the new legislation proposed by the Institute. Inadvertently, by Act 1421 of 1997, effective July 1, 1999, the legislature repealed all but one of the Louisiana Civil Code articles⁶⁷ pertaining to the law of disinheriton. The remaining references to disinheriton appeared in article 1494 which provides that a forced heir may only be deprived of his legitime if the “decendent has just cause to disinherit him.”⁶⁸ Despite this reference, the articles dealing with the procedure and formalities of disinheriton and the causes of disinheriton were no longer in the Code.⁶⁹

Discovery of the repeal occurred in January 1999, prompting the proposal of two bills to the 1999 Legislature. However, neither bill was enacted. As such, the legislature adjourned on June 21, 1999 without taking action to reenact the Civil Code articles on disinheriton. Thus, for a period of two years, no such law existed.⁷⁰

To fill this void, the legislature, on recommendation of the Louisiana State Law Institute, enacted Act 573 (H.B. No. 361) Successions-Disinheriton of Forced Heirs in the 2001 Regular

might be disinherited if she (14) became a prostitute or married a freedman without her parents’ consent, unless they had themselves neglected to provide for her marriage. See Radin, *Handbook of Roman Law* 44, § 165, at 292 n.5 (1927).

64. Swaim & Lorio, *supra* note 60, at 291-92.

65. *Id.* at 292. The twelfth ground was added in 1985. A parent may disinherit a forced heir if the child has known how to contact the parent, but has failed without just cause to communicate with the parent for a period of two years after attaining the age of majority, except when the child is on active duty in the military forces of the United States.

66. Changes occurred in both the substantive law of successions and its procedural law such as formalities, burdens and standards of proof, etc.

67. La. Civ. Code arts. 1617-1624.

68. Swaim & Lorio, *supra* note 60, at 49 (Supp. 2000).

69. *Id.*

70. This two year period of time extended from July 1, 1999 through July 1, 2001. This period of time will be referred to as the “interim period” throughout the length of this comment.

Session. The Act is comprised of Civil Code articles 1617 through 1626, and includes a retroactivity clause, Louisiana Revised Statutes 9:2502, relative to successions, which provides:

A. If a person dies after the effective date of this Act leaving an instrument in the form of a testament that was executed prior to the effective date of this Act, then a disinherison in that instrument that would be valid under the provisions of Civil Code Articles 1617 through 1626 shall be governed by the provisions of those Articles.

B. If the disinherison would not be valid under the provisions of Civil Code Articles 1617 through 1626, the disinherison shall be governed by the law in effect at the time of the execution of the instrument.

Like the legislation on disinherison that was inadvertently repealed, the new legislation on disinherison provides that forced heirs are deprived of their legitime if they are disinherited by the testator for just cause in the manner prescribed in the Civil Code.⁷¹ The new legislation stipulates the formalities for disinherison and restricts the causes for disinherison by parents and grandparents to enumerated grounds.⁷² But revised article 1621 reduces the number of causes for which a testator may disinherit a forced heir from twelve to eight. Act 573 provides for reconciliation between the testator and the forced heir(s) in addition to providing defenses for disinherison.

71. La. Civ. Code art. 1617.

72. La. Civ. Code art. 1621. A parent has just cause to disinherit a child if: (1) The child has raised his hand to strike a parent, or has actually struck a parent; but a mere threat is not sufficient; (2) The child has been guilty, towards a parent, of cruel treatment, crime, or grievous injury; (3) The child has attempted to take the life of a parent; (4) The child, without any reasonable basis, has accused a parent of committing a crime for which the law provides that the punishment could be life imprisonment or death; (5) The child has used any act of violence or coercion to hinder a parent from making a testament; (6) The child, being a minor, has married without the consent of the parent; (7) The child has been convicted of a crime for which the law provides that the punishment could be life imprisonment or death; (8) The child, after attaining the age of majority and knowing how to contact the parent, has failed to communicate with the parent without just cause for a period of two years, unless the child was on active duty in any of the military forces of the United States at the time. La. Civ. Code art. 1622 (2001).

A grandparent may disinherit his grandchild for any of the causes, other than the sixth, expressed in the preceding Article, whenever the offending act has been committed against a parent or a grandparent. He may also disinherit the grandchild for the seventh cause expressed in the preceding Article.

2. *Competing Theories on the Law During the Interim Period*

A controversy exists on what exactly the law was in the interim period between the inadvertent repeal of the old law, effective July 1, 1999 and the enactment of the new law, effective July 1, 2001. The comments to Louisiana Revised Statutes 9:2502 reveal that the legislature was aware of the dispute amongst the legal community as to what was the law during this period of time. Comment (b) states,

The bigger problem . . . is what law applies to testaments executed on or after July 1, 1999, and before the effective date of the new Act. There is considerable disagreement over the law in that time period. This transitional rule does not solve the problem, but it provides an opening to the court to conclude that, if the disinherison was valid when executed, it would be valid even though the person dies after the 2001 Revision of Civil Code Articles is enacted and the new rules may be different.

Repeal of the articles on disinherison has created speculation ranging from the obvious conclusion that the repeal eliminates all grounds for disinherison to the opposing conclusion that the repeal permits the parent to disinherit a forced heir for any cause that, in view of the circumstances of the case, might be regarded as "just."⁷³ Two dominant theories⁷⁴ have emerged in the midst of this debate, both of which implicate Louisiana Constitutional Article XII, § 5(B).⁷⁵

73. Katherine Shaw Spaht, *The Remnants of Forced Heirship: The Interrelationship of Undue Influence, What's Become of Disinherison, and the Unfinished Business of the Stepparent Usufruct*, 60 La. L. Rev. 637, 655-56 (2000).

74. It may be asserted that the courts could devise rules to govern the lacuna created by the repeal utilizing the powers granted to them by La. Civ. Code art. 4. See also François GénY, *Méthode d'Interprétation Et Sources En Droit Privé Positif*, 1954, (Louisiana State Law Institute trans.); Jardo Mayda, François GénY and Modern Jurisprudence (1978).

La. Civ. Code art. 4 provides, "When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages." In furtherance of such argument, it would be asserted that the lacuna could be filled with exactly the law that was repealed because the Civil Code articles were, after all, inadvertently repealed. However, by virtue of Article XII, Section 5 of the Louisiana Constitution, the power to determine the grounds for disinherison resides with the legislature and not with the courts. Thus, the courts are not free to fill this lacuna. See *supra*, note 73 and *infra*, note 75.

75. La. Const. art. XII, § 5 (1974) provides, "The determination of forced heirs, the amount of the forced portion and the grounds for disinherison shall be provided

a. The Yiannopoulos and Spaht Theory: Repeal Eliminates All Grounds for Disinherison

Professor A. N. Yiannopoulos⁷⁶ of Tulane University School of Law asserts in an Editor's Note to the Special Millennium Edition of the 2000 Louisiana Civil Code: "In dismantling the civil law of successions, the Successions Revision Committee of the Louisiana State Law Institute repealed Article 1621. As a result, the 'unless' clause of Article 1494⁷⁷ is now devoid of meaning and a testator may no longer disinherit a forced heir."⁷⁸

Others agree. Based upon the history of disinherison in Louisiana and the constitutional mandate requiring the grounds of disinherison to be provided by law,⁷⁹ Professor Katherine Spaht⁸⁰ argues the better view is that all of the provisions of the law of disinherison have been repealed. Thus, a forced heir may no longer be disinherited.⁸¹ She acknowledges that Louisiana Civil Code article 1494 still mentioned disinherison, but asserts that without the repealed articles to give content to those words in article 1494, the words have no independent meaning.

Both scholars argue that re-establishment of the twelve grounds by the courts as 'just causes' of disinherison under article 1494 would be judicial legislation forbidden by Article II, §2⁸² of the Louisiana Constitution.⁸³ Furthermore, both observe that the power to provide grounds for disinherison resides with the legislature, not the courts, in fulfilling its "legislative function to mold and implement the legal institution of forced heirship without thwarting or destroying the fundamental and enduring rights, principle, or purposes that such function encompasses."⁸⁴

by law. . ."

76. Eason-Weinmann Professor of Comparative Law, Tulane University School of Law.

77. Article 1494 of the La. Civil Code provides, "A forced heir may not be deprived of the portion of the decedent's estate reserved to him by law, called the legitime, unless the decedent has just cause to disinherit him."

78. *Id.* at 290.

79. La. Const. art. XXII, § 5.

80. Jules F. and Francis L. Landry Professor of Law, Paul M. Hebert Law Center at LSU.

81. Spaht, *supra* note 73, at 656-57.

82. La. Const. art. II, § 2 (1974) provides, "Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others."

83. Spaht, *supra* note 73 (*citing* La. Civ. Code art. 1494, Editor's Note by Professor A.N. Yiannopoulos (Special Millennium Edition), "Article XII, Section 5 of the Louisiana Constitution declares that 'the grounds for disinherison shall also be provided by law,' and the sources of law in Louisiana are legislation and customs, not judicial decisions.").

84. *Id.* at 659.

b. Max Nathan's "Broader Grounds" Approach

To the contrary, Max Nathan, Jr.,⁸⁵ argues that the repeal expanded the scope of the law of disinheritance through Civil Code article 1494 (which was not repealed) so that any number of conceivable grounds would be appropriate for a testator to effectively disinherit a forced heir.⁸⁶ Nathan pushes for the adoption of his "Broader Grounds" approach⁸⁷ which is founded on the belief that although the legislature may have inadvertently repealed these articles in Act 1421 of 1997, it did not unintentionally leave them repealed as it had the opportunity to cure what had been done.⁸⁸ Nathan ponders, "With article 1494 remaining in full force and effect, and without the restriction of 'just cause' to the twelve narrow grounds specified in the past, the question necessarily becomes: what is the meaning of 'just cause' in Civil Code article 1491?"⁸⁹ He answers with the argument that the legislature's rejection of narrowly defining the grounds for "just cause" suggests an intent not to limit or restrict the term as it had previously been limited; thus, it is no longer restricted to an exclusive list thereby allowing parents and grandparents to effectively disinherit a child for any reason purporting to be a "just cause."⁹⁰

B. Analysis

1. Examination of the Retroactivity Provision

Paragraph A of Louisiana Revised Statutes 9:2502 is a validating provision. It states that if a person dies after the effective date of the act leaving an instrument in the form of a testament that was executed prior to the effective date of the act, then a disinheritance in that instrument that would be valid under the provisions of Civil Code

85. President of the Louisiana State Law Institute.

86. Max Nathan, Jr., *Forced Heirship: The Unheralded "New" Disinheritance Rules*, 74 Tul. L. Rev. 1027 (2000).

87. Nathan submits three other competing theoretical approaches one could take in analyzing the issue before asserting that his proposal is the most rationally based. (The other theories include the "Die-Hard" approach which asserts that a forced heir simply cannot be disinherited unless he is declared unworthy; the "Non-Repealer" approach which would have the courts assume that the repeal of the articles was unintentional and should be ignored or treated as if it did not really happen, because the repeal of fundamental rules should not be presumed or lightly implied; and finally, the "Unconstitutional" approach which maintains that the repeal itself was an unconstitutional act and therefore should be without effect).

88. Nathan, *supra* note 86, at 1035.

89. *Id.* at 1036.

90. *Id.*

articles 1617 through 1626 shall be governed by the provisions of those articles. This provision purports to apply the new legislation to acts of disinheriton executed under the old law. Three things are required for this provision to apply: (1) the testator must die after the effective date of the new legislation; (2) the act of disinheriton must have been executed before the new legislation; and (3) the execution of the act of disinheriton must be valid under the new law.

Paragraph B states that if the disinheriton would not be valid under the provisions of Civil Code articles 1617 through 1626, then the disinheriton shall be governed by the law in effect at the time of the execution of the instrument. This provision only applies when the testator dies after the effective date of the new law. Comment (c) to Louisiana Revised Statutes 9:2502 states that the section does not propose to impose retroactively any rule that would apply to the interim period between July 1, 1999 and July 1, 2001 to affect testators who die during that period of time. Though merely doctrinal comment on the legislation and not law, this comment suggests that the drafters were only concerned with applying the new law when the testator dies after the new law became effective. It also means that the legislature took no position on what to do when the testator dies before the effective date of the new law, seeming to have left the task of determining what to do under these circumstances to the courts.

2. Enumeration and Explication of Various Scenarios; The Standard to Be Applied

It is when the facts are dispersed around the effective date of the new law that the intertemporal conflicts law problems arise. The attached chart outlines the thirteen possible scenarios of the dispersion of facts.⁹¹

In all of these cases, the conflicts-of-laws issue that the “basic” intertemporal law rules are designed to answer—did the legislature desire retroactive application of the new law—is, of course, presented. Where the legislature gave a directive regarding the temporal application of the law, that is, for those cases in which Louisiana Revised Statutes 9:2502 dictates what law is to be applied, this “basic” issue, obviously enough, is settled. But where the legislature did not give a directive regarding the temporal application of the law, that is, for those cases in which Louisiana Revised Statutes 9:2502 does not dictate what law is to be applied, the courts must apply the rules of Louisiana Civil Code article 6—the general default rule and its exceptions—to determine what law is to be

91. Please refer to Chart One at the end of this comment throughout this section.

applied. To do that, the courts not only must determine whether the new law(s) in question is (are) substantive, procedural, or interpretive, but also whether, in each given case, applying that (those) new law(s) would be "retroactive."

In making this latter determination (that is, in which cases would the application of the new law be "retroactive"), the courts should, in the judgment of this author, adopt somewhat of a hybrid standard that combines the theory of vested rights with that of the completed acts theory.⁹² A hybrid standard would be most beneficial because critical to such retroactive analysis is both the moment at which the "vested right" materializes (the forced heirship right) as well as the temporality of the "completed act" of disinheriton (the time of the execution of the act of disinheriton). Here, it is not solely one or the other that is of significance.

That the "vested rights" approach is appropriate in this context is clear. In Louisiana successions and donations law, the forced heirship right vests at the testator's death.⁹³ Thus, the forced heirship "right" is merely an expectation during the period of time spanning between the birth of the child and the death of the testator. In other words, the right is a mere expectation until the parent testator dies. Because this is so, the "vested rights" approach seems to "fit" cases that involve changes in the law of forced heirship well.

But the "completed acts" theory "fits" cases of disinheriton well. As has been noted, a disinheriton must be made in one of the forms prescribed for testaments.⁹⁴ Additionally, the disinheriton must be made expressly and for a just cause; otherwise, it is null.⁹⁵ Because of these codal requirements, the act of disinheriton and the time in which it is properly executed is a "completed act" that influences the determination of retroactive application of the law.

Whereas the "basic" intertemporal conflicts issue is presented in all thirteen scenarios, "constitutional" intertemporal conflicts issues are presented only in some of them, namely, those to which the legislature has directed (either in Louisiana Revised Statutes 9:2502 or by virtue of the "exceptions" of Louisiana Civil Code article 6) that

92. In doing so, it must be recognized that this approach would not be the most ideal for all retroactive application of law problems. Rather, this would be the most suitable solution for the current legal dilemma facing the courts in the substantive area of Louisiana law of successions, specifically disinheriton.

93. See La. Civ. Code art. 870.B ("Testate and intestate succession rights, including the right to claim as a forced heir, are governed by the law in effect on the date of the decedent's death."); see also *Henry v. Jean*, 238 La. 314, 115 So. 2d 363, 367 (1959) ("Succession rights do not vest until the death of the decedent."); *Succession of Doll v. Doll*, 593 So. 2d 1239, 1255 (La. 1992).

94. La. Civ. Code art. 1618.

95. La. Civ. Code art. 1619.

the new legislation on disinheriton be applied. In these cases, courts must use at least two different approaches to address the problem: (i) to determine whether the proposed retroactive application would violate the Due Process Clause of the state constitution, they must use the old "vested rights" theory; (ii) to determine whether the proposed retroactive application would violate the Due Process Clause of the federal constitution, they must use the newer "rational ends-means" test.

3. Examination of the Dispersion of Facts Cases

a. Case 1

(i) Basic rules

The legislature did not give a directive regarding temporal application to Case 1 on the chart. To determine the legislature's wishes, one must, then, resort to Louisiana Civil Code article 6.

The threshold question is whether applying the new law in such a case would be to apply it retroactively. The answer to this question is clearly "yes." That is so because in Case 1, all of the pertinent acts (the blameworthy conduct or cause for disinheriton, the execution of the act of disinheriton, and the death of the testator) occur during the interim period. Thus, the pertinent right—forced heirship—vests or does not vest, as the case might be, before the new law takes effect and the pertinent act—the drafting of the act of disinheriton—occurs before the new law takes effect.

The next issue to be addressed in the basic rules analysis is how should the legislation be classified. Is the new legislation on disinheriton substantive, procedural, or interpretive? The new law is substantive because it creates, defines, and regulates the rights, duties, and powers of parties. In this instance, the Civil Code articles on disinheriton create, define, and regulate the rights, duties, and powers of the parent testator and the forced heir. The forced heir is entitled to his legitime, only to be denied it if there is just cause for a disinheriton and the parent testator follows the proper procedure to effectively execute a valid act of disinheriton. The new legislation creates, defines, and regulates the respective rights of each party. Because the new legislation is substantive rather than procedural or interpretive, it should be presumed that the legislature did not want a retroactive application of the new legislation.⁹⁶

96. La. Civ. Code art. 6.

(ii) Constitutional rules

In this case no “constitutional” problem is presented. That is so because, as has just been explained, the legislature has directed, albeit through the default rule of Louisiana Civil Code article 6, that new law *not* to be applied to this case.

*b. Case 2**(i) Basic rules*

The legislature gave a directive regarding the temporal application of the new law in Case 2. This case is the situation presented when the blameworthy conduct occurred and the act of disinheriton was executed during the interim period but the death of the testator occurred after the new law came into effect. Louisiana Revised Statutes 9:2502 states that the new law is to be retroactively applied. If the act of disinheriton as executed would be valid under the new law, then Civil Code articles 1617 through 1626 are to apply. If the act of disinheriton as executed would not be valid under the new law, then the law at the time of the execution of the act is to apply. If the blameworthy conduct that brought about the act of disinheriton was one of the eight just causes for disinheriton under the new legislation, then the new Civil Code articles shall govern. If it is not, then the retroactivity provision directs that the law in effect at the time of the act of execution of the disinheriton is to apply. However, under the theory that a forced heir could not be disinherited during this period of lawless time, there is no law to govern.

(ii) Constitutional rules

The analysis now proceeds to the constitutional examination. Would applying the new law to this scenario violate due process? At first glance, it would appear that there would be no constitutional violation to apply the law retroactively in that forced heirship rights do not vest until the death of the testator which in this case occurred after the new law came into effect. Hence, there would be no divesting of a right because that right did not materialize until after the new law became effective. On the other hand, because a forced heir could not be disinherited during the interim period, it would appear that to deprive the forced heir of his legitime would be a violation of due process. This scenario is likely to be a controversial one for the courts. Because the Louisiana courts still use the vested rights test for due process, it is probable that this application will not be found to be in violation of the constitution. However, there is also

the federal constitutional question, which is to be resolved on the basis of the "rational means-ends" test. The question arises: what "end" is the legislature seeking to achieve by ordering this retroactive application, if, indeed, that is what it is? Furthermore, are the "means" chosen by the legislature rational? The Louisiana legislature re-enacted the Civil Code articles on disinheriton (with some revisions) to reinstate those articles that had been inadvertently repealed. (This is the "means" chosen by the legislature). The Louisiana constitution mandates that the causes for disinheriton be provided by law. (This is the "end" sought to be achieved). Thus, it appears that this retroactive application would pass federal constitutional muster as the U.S. Supreme Court has only required a standard of reasonableness and has stated that when this is met, "judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches."⁹⁷

c. Case 3

(i) Basic rules

Case 3 presents the dispersion of facts in this sequence: the blameworthy conduct occurs in the interim period while the act of disinheriton is executed after the effective date of the new law and the death of the testator occurs after the effective date. The legislature did not give a directive regarding retroactivity to this situation in Louisiana Revised Statutes 9:2502 because the act of disinheriton was not executed before the new legislation. This does not qualify as a retroactive application of the new law in that both the execution of the completed act and the forced heirship right vested after the effective date of the new law, July 1, 2001 (with the new articles in the Code allowing a parent to effectively disinherit a child for just cause). Thus, there is no need to analyze the constitutional permissibility of a retroactive application.

d. Case 4

(i) Basic rules

The three criteria required in order for Louisiana Revised Statutes 9:2502 to apply are not present in Case 4 where the blameworthy conduct occurred before July 1, 1999 and the execution of the act of disinheriton and the death of the testator occurred in the interim

97. Krent, *supra* note 5, at 2150-51 (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-30, 104 S. Ct. 2709, 2717-18 (1984)).

period. Thus, there is no directive given by the legislature in this instance. Nonetheless, to apply the new law to this dispersion of facts would be a retroactive application of the law because both the forced heirship right vested and the act of disinheriton was executed in the interim period when no law on disinheriton existed. The right vested before the effective date of the new law and an act was realized during the reign of the old law (before the new law came into effect). Thus, this qualifies as a retroactive application.

Having determined that this indeed qualifies as a retroactive application, should the default rule presuming that the legislature did not intend for the legislation to have a retroactive application be applied? The legislation enacted in Act 573 is substantive because it creates, defines, and regulates the rights, duties, and powers of individuals. Thus, the general default rule applies, and it is to be presumed that the legislature did not want the new legislation to be retroactively applied in this instance.

(ii) Constitutional rules

For the same reasons given in connection with Case 1, there is no constitutional problem in this case.

e. Case 5

(i) Basic rules

Case 5 presents the scenario consisting of the dispersion of facts in the following manner: when both the blameworthy conduct and the execution of the act of disinheriton occurred before July 1, 1999 (when there existed legislation on disinheriton) but the death of the testator did not occur until the interim period. Louisiana Revised Statutes 9:2502 does not direct temporal application of this case.

And so one must turn to Louisiana Civil Code article 6. Applying the new law here would qualify as a retroactive application of the law because the forced heirship right vested during the interim period when there was no law on disinheriton. Likewise, the pertinent act, the execution of the act of disinheriton, was realized during the reign of the old law. This was a completed act; thus, the application of the new law in this case qualifies as retroactive because laws operate directly on acts by assigning juridical consequences to them.

The analysis proceeds to the determination of the classification of the law. Again, the new articles on disinheriton are substantive law because they create, define, and regulate the rights, duties, and powers of parties. Because Civil Code articles 1617 through 1626 are substantive law, it is to be presumed that the legislature did not want

the new legislation applied retroactively in this instance. Thus, there should be no disinheriton of the forced heir in this dispersion of facts.

(ii) Constitutional rules

For the same reasons given in connection with Case 1, there is no constitutional problem in this case.

f. Case 6

(i) Basic rules

There is obviously no retroactivity problem presented when all three pertinent acts in Case 6 (that is the blameworthy conduct, the execution of the act of disinheriton, and the death of the testator) occur before July 1, 1999 (before the inadvertent repeal of the Civil Code articles on disinheriton). The analysis stops because there is no intertemporal conflicts law problem. There is no need to evaluate the constitutional permissibility of the retroactive application. The law that would govern this situation would be the law that was in effect through July 1, 1999.

g. Case 7

(i) Basic rules

Case 7 involves the sequence of facts in this manner: the blameworthy conduct occurred before July 1, 1999 when there still existed effective legislation on disinheriton, the act of disinheriton by the parent was executed in the interim period, and the death of the testator occurred after the new law became effective (after July 1, 2001). The legislature specifically gave a directive regarding the temporal application of the law to this dispersion of facts: the law is to be retroactively applied. Through Louisiana Revised Statutes 9:2502, the legislature commands that if the disinheriton executed during the interim period would be valid under the new law, then it will be governed by articles 1617 through 1626 of the Civil Code, and will be valid even though the act was executed during the period of time in which no law existed. Thus, for the new legislation to apply, the cause for disinheriton has to have been one of the eight remaining in Civil Code article 1621. If it was not one of these eight or if the execution of the act of disinheriton would still be invalid under the new legislation, then Louisiana Revised Statutes 9:2502 orders that the disinheriton shall be governed by the law in effect at the time of the execution of the instrument. However, there was no law in effect

at the time of the execution as it occurred during the interim period. A forced heir could not be disinherited during this period of time.

(ii) Constitutional rules

Under the vested rights test, Louisiana courts are likely to conclude that there would be no violation of the state constitution in this case because the forced heirship right did not vest until after the effective date of the new law. Thus, there would be no violation of due process for the law to be retroactively applied. Under the federal rational means-ends test, provided that the retroactive application of the statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative branch. It appears, then, that this retroactive application would pass federal constitutional muster for the reasons discussed in Case 2.

h. Case 8

(i) Basic rules

Case 8 presents the blameworthy conduct and the execution of the act of disinheriton occurring before July 1, 1999 and the death of the testator occurring after July 1, 2001. A legislative directive regarding temporal application was given through Louisiana Revised Statutes 9:2502. Paragraph A of the Revised Statutes states that if the disinheriton as executed under the old law (before July 1, 1999) is valid today under the new law, then the articles on disinheriton enacted effective July 1, 2001 shall govern the disinheriton. If not, paragraph B commands that the law in effect at the time of the execution of the instrument shall govern the disinheriton. If the disinheriton executed in this case is not valid under the new legislation, then the law in effect until July 1, 1999 would govern.

(ii) Constitutional rules

Under the vested rights theory used by Louisiana courts, a retroactive application in this case would not be in violation of the Due Process Clause because the forced heirship right did not vest until after the effective date of the new law. Furthermore, due process is afforded through the retroactivity provision in that the previous law is to be applied if the disinheriton would not be valid as executed under the new law. The same analysis discussed in Case 2 regarding the federal constitutional due process provision applies in this instance.

*i. Case 9**(i) Basic rules*

Case 9 is the situation that exists when none of the pertinent acts occurs in the interim period. Rather, this situation is present when the blameworthy conduct occurs before the inadvertent repeal (July 1, 1999) and both the execution of the act of disinheriton and the death of the parent testator occur after the effective date of the new law. The criteria that the act of disinheriton be executed before the new legislation is not fulfilled so there is no directive with respect to temporal application to this situation contained in Revised Statutes 9:2502. This would not qualify as a retroactive application of the new law for the blameworthy conduct allowing such an act had to have been one of the eight prescribed just causes in article 1621; otherwise, the disinheriton would be a nullity for lack of codal compliance. Additionally, the forced heirship right vested at the death of the testator which occurred after the effective date of the new law. Consequently, the intertemporal law analysis stops because there is no need to inquire into the constitutional permissibility of the retroactive application because there is no intertemporal conflicts law problem in this instance.

*j. Case 10**(i) Basic rules*

Case 10 presents the situation that occurs when the blameworthy conduct which was one of the four eliminated takes place before July 1, 1999 (when, in actuality, this cause would have been a just cause for disinheriton under the old articles), the act of disinheriton was executed in the interim period, and the death of the testator occurred after the effective date of the new law (July 1, 2001). The legislature has spoken through Revised Statutes 9:2502 regarding the temporal application of the new law to this situation. The law is to be retroactively applied. The disinheriton would not be valid under the new legislation because it was executed for a cause that was one of the four eliminated. Paragraph B of Louisiana Revised Statutes 9:2502 states that the disinheriton shall be governed by the law in effect at the time of the execution of the instrument if it would not be valid under the new law.

(ii) Constitutional rules

Would retroactively applying the new law to this scenario violate due process? The parent testator died after the effective date of the

new legislation and hence, the property right materialized at that time. Under the vested rights test employed by Louisiana courts, this retroactive application would not be a violation of the Due Process Clause. To reiterate what was explicated previously, a right is vested when the right to enjoyment, present or prospective, has become the property of some particular person as a present interest. Thus, there is no violation of due process because the right of the forced heir vested after the effective date of the new legislation. It is likely that this retroactive application will meet the burdens of the federal "rational means-ends" test for the reasons discussed in Case 2.

k. Case 11

(i) Basic rules

Case 11 is similar to Case 10. In this instance, the blameworthy conduct (which was one of the four eliminated just causes) occurred before July 1, 1999 with the act of disinherison executed and the death of the testator occurring after July 1, 2001. Because the execution of the act of disinherison occurred after the effective date of the new legislation, Louisiana Revised Statutes 9:2502 does not direct the temporal application in this instance. Because the execution of the act of disinherison occurred after the effective date of the new law, the just cause allowing the disinherison had to have been one of those eight remaining in Civil Code article 1621. Otherwise, the disinherison would have been invalid anyway for lack of just cause. The death of the parent testator also occurred after the effective date of the new law. Thus, this would not qualify as a retroactive application of the new law. It is merely governed by the law that was in effect when the act of disinherison was executed which is the new legislation itself.

l. Case 12

(i) Basic rules

The dispersion of facts in the following manner comprises Case 12: the blameworthy conduct on the part of the child (again, which was one of the four eliminated causes) occurred before the inadvertent repeal; the act of disinherison was executed before July 1, 1999 (under the law that was inadvertently repealed); and the death of the parent testator occurs after July 1, 2001. Here, no pertinent acts occurred during the interim period. Parents who made disinherisons in testaments prior to July 1, 1999 would have had at their disposal four more causes with which to effectively disinherit

their children than those that exist today under the revision of articles 1617 through 1626. Comment (b) to Revised Statutes 9:2502 provides that this transitional rule would validate disinherisons made in testaments executed prior to July 1, 1999. The legislature specifically provided that such disinherisons executed in testaments in this dispersion of facts will be valid.⁹⁸ The basic rules are used to determine whether the legislature wanted the new law to be applied retroactively. Legislative intent and direction controls this set of rules. Thus, there is no retroactive application of the law because the legislature has spoken to this effect. The disinherison is valid because it is governed by the old law in effect at the time of the execution of the instrument when there were four additional causes for which to disinherit a child.

m. Case 13

(i) Basic rules

Finally, Case 13 presents the dispersion of facts where both the blameworthy conduct of the child (which was one of the four causes eliminated) and the act of disinherison was executed prior to July 1, 1999 with the death of the testator occurring during the interim period. Again, comment (b) to Revised Statutes 9:2502 provides that this transitional rule would validate disinherisons made in testaments executed prior to July 1, 1999. Legislative intent and direction controls the basic rules analysis. Thus, the execution of the act of disinherison would be valid. However, the problem in this dispersion of facts is that the parent testator died during the interim period when a forced heir could not be disinherited.

(ii) Constitutional rules

The forced heirship right vested at the death of the parent testator during the interim period. The courts will be forced to decide if the forced heir should be deprived of his legitime when the testator dies

98. It must be noted that the legislature obviously did not perceive many, if any, cases displayed by the dispersion of facts in this manner in that Comment (b) to La. R.S. 9:2502 states, "The likelihood of there being a testament with one of those grounds is extraordinarily slim, since the grounds are very remote and there has never been a reported case for any one of them in nearly 200 years." The comment is referring to the four causes that were eliminated by the revision of the Civil Code articles on disinherison. While the fact that none of those four were ever reported in nearly 200 years is persuasive that this situation will not pose a problem, it is not completely impossible or unlikely, however, that such a situation would not occur. To the contrary, attorneys are occasionally (though rarely) approached by testators inquiring about disinheriting a child for one of the very causes that was eliminated.

during this period of time. The legislature specifically intended for acts of disinheritance executed in testaments prior to July 1, 1999 to be valid, indeed, it has spoken to that effect. Nonetheless, the right vested when there existed no law on disinheritance. Under the vested rights theory employed by Louisiana courts, it appears that to strip this forced heir of his vested property right would be to violate due process. This case presents competing interests—those of the legislature versus those of the individual. In this particular instance, it is likely that the Louisiana courts will find this divesting of a right to be unconstitutional and therefore will likely rule that there should be no disinheritance.

IV. CONCLUSION

One must take care to neither fail to appreciate the significance of the law of retroactivity of laws (intertemporal conflicts law) nor underestimate its complexity and its place in Louisiana's civil law. As the preceding analysis illustrates, this body of law can potentially affect any substantive area of the law and any number of rights, both patrimonial and non-patrimonial.

It is the duty of the legislature to enact legislation that promotes a civilized and just society. The law itself is the result of a balancing of competing social policies. Louisiana's civil law composes a portion of the private law. The Louisiana Civil Code was designed to stand the test of time. It has performed beautifully. Nonetheless, the mere passage of time oftentimes requires that the law conform to the social norm of a particular time. Medical and technological advances are only two of many examples that effectively illustrate how the law must sometimes adapt and/or change to apply to new situations that develop in modern time.

The determination of the permissibility of the retroactive application of the revision of the Civil Code articles on disinheritance will be best accomplished by the courts if they employ a hybrid standard comprised of portions of both the "vested rights" theory and the "theory of completed acts." This hybrid standard prevails over either standard alone in that with the successions law problem of disinheritance, thorough analysis of the "vested right" (the forced heirship right) and the "completed act" (the execution of the act of disinheritance) are both crucial to the determination of constitutionally permissible retroactive application.

As the preceding analysis reveals, "[t]he constitutionality of a retroactive statute depends upon a variety of policy considerations."⁹⁹

99. Hochman, *supra* note 14, at 726.

In all retroactive applications, there are bound to be some losers.¹⁰⁰ While we are blessed to live in a nation that affords great liberty and rights to its citizens, no right is absolute. Individual rights must be weighed against the goals and objectives the legislature seeks to further by enacting appropriate legislation in its quest for a civilized and just society.

Scholars are correct in asserting that the entire area of intertemporal conflicts law has long been due a re-analysis, both by the courts and the legislature, in that it currently fails to address such problems in a coherent, consistent manner.¹⁰¹ The reoccurrence of this area of the law demands that it be paid greater attention by the legislature, the courts, attorneys, and civilians alike. Such comprehensive studies and analyses are vital if we are to accomplish the smooth transition into new law while simultaneously protecting the rights of Louisiana citizens.

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100. See generally Levmore, *supra* note 3.

101. Exactly how such is to be accomplished is, of course, for another time and place. For now, applying a hybrid standard of retroactivity to the determination of retroactive application of the new law on disinheritance when the legislature has not given a directive regarding temporal application will result in a just adjudication of the competing interests at hand.

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Chart One

Case	Before July 1, 1999	Between July 1, 1999 and July 1, 2001	After July 1, 2001	Retroactive Application?
1		F DIS DEATH		NO
2		F DIS	DEATH	**
3		F	DIS DEATH	N/A
4	F	DIS DEATH		NO
5	F DIS	DEATH		NO
6	F DIS DEATH			N/A
7	F	DIS	DEATH	**
8	F DIS		DEATH	OK
9	F		DIS DEATH	N/A
10	FO	DIS	DEATH	**
11	FO		DIS DEATH	N/A
12	FO DIS		DEATH	N/A (disin.)
13	FO DIS	DEATH		NO (no disin.)

Key:

N/A = Not applicable; the application of the new law does not qualify

as a retroactive application

F = Blameworthy conduct/cause for disinherison

DIS = Act of disinherison by testator

DEATH = Death of the testator

FO = One of the four causes eliminated from the list of just causes for disinherison by the new law

** = The result reached will depend on the test employed by the courts